COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1406 **Cir. Ct. No. 2008FO39**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WAUPACA COUNTY,

PLAINTIFF-APPELLANT,

V.

JAN C. BAX,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.[1] Waupaca County appeals the circuit court's order dismissing a citation issued to Jan Bax for a zoning violation. I reverse the order of dismissal and remand for further proceedings.

Background

¶2 Bax owns lake property in Waupaca County. Underlying this case is a nonconforming shed on the property near the shoreline. Bax renovated the shed and, in the process, expanded its size.

¶3 The County cited Bax for violating section 8.31(1) of the County's shoreland zoning ordinance. This provision states that nonconforming accessory structures such as Bax's shed are "limited to ordinary maintenance and repair" and "shall not be improved or expanded." At a bench trial, the County apparently proceeded under the assumption that it did not need to prove the amount of the expansion, but rather simply that Bax did expand the shed.

¶4 Although there was no dispute that the shed now measures eight feet by eight feet, the evidence the County presented regarding the size of the unaltered shed was often vague, and much of that evidence was implicitly rejected by the circuit court. Still, it appears the circuit court assumed that the shed size was increased about three inches to the north and three inches to the south. This implicit finding is supported by photographic evidence and by Bax's testimony that the shed's size increased by no more than "a few inches" in the "north/south direction."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 The photographs of the unaltered shed show that its roof extended out past the north and south walls more than three inches in both directions. Post-renovation photographs show that the renovation extended these walls out to the ends of the roof, thereby eliminating the overhangs. These photographs, combined with Bax's testimony that the roof size did not change, demonstrate that the increase in size was more than three inches in both directions.

¶6 The circuit court found that the shed was expanded, but apparently concluded that, if the expansion was three inches to the north and three inches to the south, the expansion did not violate the ordinance because it was a *de minimis* expansion.

Discussion

¶7 Waupaca County Shoreland Zoning Ordinance section 8.31(1) provides:

> Nonconforming accessory structures are limited to ordinary maintenance and repair and such alteration as shall bring them into greater compliance with the terms and objectives of this ordinance. Such structures *shall not be* improved or *expanded*.

(Emphasis added.) Before the circuit court and before this court, the County's only developed argument is that Bax impermissibly "expanded" his shed. The County argues that the circuit court erred when it decided that Bax expanded his shed but that the expansion did not violate the ordinance because it was *de minimis*.

¶8 The circuit court began its oral explanation of its decision by noting that introductory language in the ordinance speaks of "balancing" interests. This is certainly true. The main objective of ordinances that regulate nonconforming

structures is to balance private property rights with the need to eliminate such structures. ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 33, 498 N.W.2d 842 (1993). There is no suggestion, however, that this language is a directive to courts to balance interests when applying unambiguous provisions in an ordinance. Rather, the statement reflects that the provisions themselves have been drafted with a mind toward balancing interests. Pertinent here, nonconforming *principal* structures are treated differently than nonconforming *accessory* structures. For example, nonconforming principal structures may be improved internally and expanded up to 25%. Ordinance section 8.31(2)(a). In contrast, nonconforming accessory structures may be maintained and repaired, but "shall not be ... expanded." Ordinance section 8.31(1).

¶9 The ordinance, as it applies to Bax's shed, is unambiguous. Nonconforming accessory structures, which include Bax's shed, "shall not be ... expanded." Since it is undisputed that Bax did expand his shed, the only issue is whether the circuit court correctly determined that the expansion was *de minimis*.

¶10 In certain respects, the evidence in this case was summed up nicely by the attorney representing Bax. He conceded that the roof remained the same, and the only difference in the shed's size was that the shed now "occupies all the space under the roof." Bax's attorney also correctly observed that the unaltered shed was never six feet by six feet. Instead, the shed was expanded to eight feet by eight feet solely by expanding "minimally on the north and south sides."[2]

[2] Notably, although Bax's counsel argued that the expansion was not enough to constitute a violation, he focused much of his argument on the appropriate remedy, suggesting that it was unreasonable to require that Bax undo the expansion or remove the shed entirely. Instead, Bax's attorney argued, it would be more productive to require Bax to engage in some sort of community service.

I agree with the implicit finding of the circuit court that the County failed to prove that the unaltered shed was six feet by six feet. Thus, I turn my attention to the amount of expansion in the north and south directions.

¶11 My review of the record shows that any finding that the expansion was less than three inches to the north and three inches to the south would be clearly erroneous. Accepting that the roof size remained the same (an assertion made by Bax's counsel and supported by both the testimony and the photographic evidence), and accepting as true Bax's admission that he increased the size no more than "a few inches" in the "north/south direction," it is readily apparent from the photographs that the expansion in each direction was no less than three inches. Indeed, it is obvious from the photographs showing the roof overhang before the renovation that the expansion was more than three inches, but I need not resolve just how much more.[3]

¶12 Accordingly, viewing the evidence in a light most favorable to the circuit court's decision, Bax expanded the area of the shed three inches by eight feet on each of two sides for a total of six inches by eight feet, or four square feet. This means that the shed size was increased from sixty square feet to sixty-four square feet, a 6.7% expansion.

[3] Two photographs of the underside of the renovated structure show that the expansion was well in excess of three inches in both directions. The photographs, as Bax's counsel clarified during cross-examination of the County employee who took them, show expansion to the north and south ends. The photographs and the testimony elicited by Bax's attorney support a finding that the expansion was approximately one foot in each direction. However, because it is possible, for reasons not apparent in the cold record, that the circuit court did not believe that the photographs depicted what the County employee said they did, I do not rely on them. The overhang photos, on the other hand, speak for themselves.

¶13 The court relied on the *de minimis* doctrine, more fully stated as "*de minimis non curat lex*": "The law does not concern itself with trifles." BLACK'S LAW DICTIONARY 496 (9th ed. 2009). The County suggests reasons why the *de minimis* doctrine should not be applied in this zoning context, but I need not resolve that issue. Accepting for purposes of this case only that the doctrine may be applied in the zoning context, I conclude that the expansion here was not *de minimis*.

¶14 As reflected in the photographs and the testimony, the shed is visibly larger. Given the small dimensions of the unaltered shed, a reasonable person in Bax's position would have known that he was significantly increasing the shed's size.

¶15 More broadly, a 6.7% deviation is not *de minimis*. Suppose a lake-front property owner constructed a principal structure 6.7% closer to a lake than permitted. If the setback is seventy-five feet, this means siting the building five feet closer. It could not be seriously argued that placing the lake home five feet closer than the regulations permit is a *de minimis* deviation. The same is true here.

¶16 Therefore, I reverse the order of the circuit court and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.